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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 834

VIRGIL FLOYD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Virgil Floyd, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on January 13, 1956.

JUDGMENT AND OPINIONS OF THE COURTS BELOW.

The judgment of conviction and order of commitment were entered by the United States District Court for the Southern District of Illinois, Northern Division, on December 13, 1954. They are not reported but are printed in the transcript of record, pages 183-184.

The opinion of the United States Court of Appeals for the Seventh Circuit affirming said judgment was filed on January 13, 1956, and is reported at 228 Fed. Rep. Second Series 913.

JURISDICTION.

On February 9, 1956 the Court of Appeals entered an order denying the petition for rehearing filed by the petitioner. On March 5, 1956 this Honorable Court entered an order allowing the petitioner's application for extension of time within which to file the petition for writ of certiorari, to and including April 9, 1956. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. In a criminal prosecution for extortion under the Hobbs Act, is the venue of such crime coextensive with the commerce affected thereby and can the provisions of 18 U.S.C.A. 3237 be applied to sustain the laying of venue in a district through which such affected commerce runs even though the alleged threats and payment of money occurred in other districts?

2. Is an indictment charging a violation of the Hobbs Act, of which extortion is an essential element, sufficient at law when it alleges that the extortion was practiced upon "contractors" and when it defines the term "contractors" as a co-partnership, naming all members of such firm without specifying the individual partner to whom the threats were directed or upon whom the extortion was practiced?

3. Does the evidence in this cause sustain proof beyond a reasonable doubt that Martin Shay delivered the sum of $2,650 to the defendant at Kansas City, Missouri, on November 25, 1952?

4. Insofar as representatives of employees employed in an industry affecting commerce are concerned, are not the specific provisions of Section 302(b) of the Labor Man-

agement Relations Act (29 U.S.C.A. 186) repugnant to the general provisions of the Hobbs Act and, therefore, as to this class of individuals, has not the Hobbs Act of 1946 been repealed by implication, and if the petitioner be guilty of any unlawful conduct, should he not have been indicted under Section 302(b) of the Labor Management Relations Act rather than the Hobbs Act.

STATUTES AND RULES INVOLVED.

Articles III, Section 2, United States Constitution.
Sixth Amendment, United States Constitution.
Section 1951, Title 18, U.S.C.A. (1946 and 1948).
Section 3237, Title 18, U.S.C.A.
Section 186, Title 29, U.S.C.A.

STATEMENT OF THE CASE.

After a trial by jury, the petitioner was convicted of the delay and obstruction of interstate commerce by extortion in violation of Section 1951, Title 18, U.S.C.A.

The indictment returned by the grand jury consisted of two counts. The count upon which the petitioner was convicted was Count 1. It charged that between April 1, 1952 and December 1, 1952 the petitioner obstructed, delayed and affected commerce and attempted to do so by extortion, that is by obtaining money in the sum of $2,650 from the partnership. The second count of the indictment was dismissed upon the motion of the Government because of its failure to allege venue.

Between the latter part of December, 1951 and February, 1953, there was constructed between Cushing, Oklahoma, and East Chicago, Indiana, a pipeline, which ultimately was to be used for the transportation of crude oil (R. 24). The first oil was delivered at East Chicago, Indiana, through this line on March 5, 1953 (R. 25).

A partnership doing business as J. L. Cox & Sons, and consisting of Morris Stout, Martin Shay and Joseph LeRoy Cox had two contracts (1) a contract with the Sinclair Pipeline Company to unload pipe from the cars and stockpile it at the railroad sidings, and (2) a sub-contract with the O. R. Burden Construction Company to string the pipe (R. 25).

A pipe-stringing operation is defined as the taking of pipe at a railhead or a storage yard, loading it on trucks and transporting it to the pipeline right of way in such a manner that the construction contractor can move along, pick it up and weld it (R. 40). The pipe-stringing operation in this case is confined to a group of counties in Southern Illinois (R. 42).

The petitioner Virgil Floyd is business agent of Local 179 of the Teamsters' Union (R. 35).

Morris Stout met the petitioner for the first time when he voluntarily went to the petitioner's office at the Labor Temple in Pontiac, Illinois, in the spring of 1952 to secure permission to use his own drivers for the unloading operation. At the time he informed the petitioner that his firm was attempting to secure the pipe-stringing contract. The petitioner gave him permission to use his own drivers but told him to come back if the firm secured the pipe-stringing operation (R. 43-44).

Morris Stout saw the petitioner a second time on August 29, 1952 when he voluntarily went to the petitioner's office in Joliet, Illinois. He informed the petitioner that his firm had secured the pipe-stringing contract. Stout then stated that the petitioner told him that the firm would have to pay the defendant $25 a mile or a total of $2,650, otherwise the petitioner would swamp the firm's trucks with unnecessary employees. Stout further stated that he gave his personal check to the petitioner drawn in the amount of

$850, as a down payment (R. 45-58). It was customary for the firm members to apply to the firm for reimbursement of any disbursements for the benefit of the firm; Morris Stout did not apply to the firm for reimbursement of this $850 and was not repaid by the firm (R. 64).

The petitioner denies that he ever required the payment by the firm of $25 per mile on the stringing operation, that he ever threatened the firm trucks with extra helpers, or that he ever received a check from Stout in the amount of $850 (R. 96, 99).

The petitioner testified that on August 26, 1952 Stout had called him from Kansas City, Missouri, and requested the transfer of five men into Local 179, and the petitioner instructed him to bring social security numbers and other necessary data to his office at Joliet, Illinois. The records of Local 179 reflect that five of Cox's drivers were transferred into the local on that day, that their dues were paid by Stout, and that normal union business was being conducted (R. 88).

Martin Shay claims that the petitioner returned the uncashed $850 check to him on November 25, 1952 at Kansas City, Missouri, and that later the same day Stout tore this check up and threw it in a wastebasket at a local hospital (R. 71-72).

Stout feared that the petitioner's threat and demand would affect the profitable operation of the stringing contract (R. 55). The unloading operation for Sinclair was completed before the stringing operation began (R. 56).

The petitioner never threatened Morris Stout with physical violence or placed him in fear of bodily harm, and he did not threaten to harm the firm equipment in any way (R. 60).

Martin Shay and Morris Stout voluntarily contacted the petitioner at the petitioner's office on November 22, 1952, which was about five or six weeks before the stringing operation in question was completed (R. 49). Stout testified that the petitioner refused to cash the previously issued check of $850 and wanted only cash. Stout and Shay were wearing jackets which fascinated the petitioner, and they informed him that this type of jacket could be purchased at Rothschild's at Kansas City, Missouri. Stout further testified that the petitioner stated he would travel to Kansas City to purchase one of these jackets and that he would also pick up $2,650 in cash (R. 51). The petitioner testified that he did not threaten Stout or Shay in any manner on November 22, 1952 (R. 99), and that he had no discussion with them relative to any money or check other than the sum of $52, which would cover the transfer of four men (R. 98). He further testified that he would travel with his wife to Kansas City, Missouri, in the near future (R. 99-100). The union records of Local 179 indicate that four of the firm employees were transferred into the union as of November 24, 1952, after their dues in the amount of $52 had been paid in cash (R. 88-89).

Shay met the petitioner and the petitioner's wife in the Union Station at Kansas City, Missouri, on November 25, 1952 (R. 68). Mrs. Stout, whose husband Morris Stout had been taken to the hospital, telephoned Shay to advise him that the petitioner was in town. The petitioner also called Shay that morning at the partnership offices. Shay had his bookkeeper cash a firm check at a local bank in the amount of $2,650. Thereafter, he went to the Union Station where he met the petitioner and his wife. They went to the men's washroom, and there Shay handed the defendant an envelope (R. 70). Shay testified that the petitioner returned the uncashed check which had been pre-

viously issued by Stout in the amount of $850 (R. 71). The petitioner testified that he and his wife arrived at Kansas City, Missouri, via the Santa Fe Railroad between 7:30 and 8:00 o'clock in the morning. He called Mr. Stout's home and was advised by Mrs. Stout that Mr. Stout had suffered a heart attack and was confined to a hospital. She further advised the petitioner to call the partnership office, which he did. During this phone conversation he expressed sympathy over Mr. Stout's condition, and Shay requested that he stay at the station because he would come over. The petitioner testified that he never accompanied Shay to the washroom and that he never returned any uncashed check in the amount of $850 to Shay. They chatted about 20 minutes and then parted, and the petitioner and his wife went to Rothschild's to purchase a jacket (R. 100-102).

The petitioner's wife testified that she met Martin Shay at the Union Station in Kansas City, Missouri, and that neither of them ever left her presence (R. 110).

John Strohm, the cashier of the local bank, testified that the partnership bookkeeper had a $2,650 check cashed against the firm account on November 25, 1952, that there were 13 other debits against the same account on the same day (R. 81) and that it was customary for the Cox firm to come in and make out cashiers' checks and take cash away (R. 83).

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals that a defendant, charged with a violation of the Hobbs Act, 18 U.S.C.A. 1951(a), can be indicted and prosecuted not only where the coercive acts occur but also in any district through which flows the interstate commerce adversely affected by the violation represents a serious abridgment and derogation

of the constitutional right, guaranteed to every defendant under Article III, Section 2 and the Sixth Amendment, to be tried in the district where the crime shall have been committed. The determination of venue according to the place of the affect of a violation is not only a novel concept in the administration of criminal justice but, more seriously, it is a rule which is directly opposed to the settled law, as repeatedly announced by this Honorable Court, namely, that the venue of a crime shall be laid where the unlawful act occurs. The application by the Court of Appeals of the venue provisions of 18 U.S.C.A. 3237 to this case is clearly erroneous. The construction and interpretation by that Court of the second paragraph of 18 U.S.C.A., which was added in 1948, is not warranted either by its clear statutory language or by the decision of this Honorable Court in *United States* v. *Johnson,* 323 U.S. 273, which gave rise to the 1948 addition. The Court of Appeals for the Seventh Circuit has announced an interpretation of the statute in question which is in conflict with the interpretation of the Court of Appeals for the Tenth Circuit in *United States* v. *Ross,* 205 F. 2d 619. The meaning given to this section by that Court has no basis whatever and should be corrected and clarified by this Honorable Court, which heretofore has not rendered any decision on the 1948 addition to 18 U.S.C.A. 3237. Such action is required not only for the correction of an erroneous result in this cause but also for the proper and correct application of that statutory provision in the future administration of criminal justice. This Court has never regarded questions of venue as mere formalities; during this very term, it has allowed review of two cases, involving similar problems. *Johnson* v. *U. S.,* No. 643; *U. S.* v. *Patteson,* No. 704.

The indictment, which forced the petitioner to guess which of the three partners is the alleged victim of the claimed coercive acts is not consistent with the guarantee of the Sixth Amendment that every defendant shall have the right "to be informed of the nature and cause of the accusation." There is a failure of proof that the petitioner received $2650 as charged; the verdict rests on a series of inferences. The case presents a repugnancy between the Hobbs Act and Section 302 of the Labor Management Relations Act of 1947 (29 U.S.C.A. 186), which calls for judicial disposition.

The questions, presented by this case, are constitutionally serious and basic in the administration of criminal justice. They require this Honorable Court's exercise of its supervisory authority over matters in this field. *McNabb* v. *U. S.*, 318 U.S. 332, 341; *Offutt* v. *U. S.*, 348 U.S. 11, 13.

I

In the words of the Court of Appeals, a "serious problem presented here is that the proof was not sufficient to establish venue in the Southern District of Illinois". (App. p. 6a). The petitioner submits that the Court's ruling in favor of the government is clearly erroneous. Neither the evidence nor the law supports it. It rests upon an unwarranted and strained extension and application of the venue provisions of 18 U.S.C.A. 3237. It reduces the venue guarantees of Article III, Section 2 and of the Sixth Amendment to nullity in all federal crimes against commerce.

The evidence on this point is clear and simple. It is found primarily in the testimony of Morris Stout, one of the co-partners. He sought the petitioner out and met him for the first time in the spring of 1952, at Pontiac,

Illinois, which is within the Southern District of Illinois (R. 43). At pages 44-45 of the transcript of the record, the pertinent portion of Stout's testimony continues as follows:

"Q. Did you have a conversation with Mr. Floyd?
"A. Yes, sir.
"Q. At that place?
"A. Yes, sir.
"Q. What was said by you and what was said by him, if anything?
"A. I explained to him what our situation was.
"Q. What was your situation?
"A. We were going to unload all of this pipe for storage. We had a small amount of it that would be necessary to haul on truck and pole trailer. Teamsters would be used on the truck as drivers, our regular drivers. He said the job doesn't amount to much, go ahead.
"Q. Did he say anything at that time and place?
"A. I told him that we were trying to get the contract to string the pipe. He said, 'You go ahead with the unloading, but if you get the stringing, you come see me before you start.'
"Q. Did that terminate the conversation?
"A. Yes, sir."

At this point it must be noted that the stringing contract which, under the indictment and the Government's theory, was delayed and obstructed by the petitioner's alleged unlawful actions, was not yet in existence. The record clearly shows the history of the stringing contract in question to be as follows: the Sinclair Pipeline Company sublet to the Briton Brothers Contracting Company; the Briton Company sublet to the O. R. Burden Construction Corporation; the O. R. Burden Construction Corporation subcontracted to the J. L. Cox & Sons Company. (R. 25). It is also clear from the evidence that the Burden Corporation was not awarded the subcontract by the Briton organization until May 12,

1952, which was after the Pontiac meeting between Stout and the petitioner. (R. 28). The Cox partnership was awarded the subcontract for the stringing operation, alleged to be harassed by the petitioners some time in the late summer of 1952. (R. 45, 79). At the time of the Pontiac conversation, therefore, the Cox firm had not even an assurance that they would be awarded the stringing contract in question. It cannot be said that they even had a reasonable expectancy because the Burden Company, which subcontracted to the Cox firm, was not awarded the contract by Briton Brothers until May 12, 1952. Furthermore, there is no evidence that Briton Brothers were assured of this contract by the Sinclair Pipeline Company. At the time of the Pontiac conversation, the hope of the Cox firm for the stringing subcontract was most remote. It was dependent upon too many conditions beyond the control of any of the partners.

Stout again sought the petitioner out and saw him the second time on August 29, 1952 at Joliet, Illinois, which is within the Northern District of Illinois. (R. 45) It was here that the petitioner allegedy uttered the threats. (R. 47). Stout immediately left for his office at Raytown, Missouri to discuss the matter with his co-partners. (R. 49). This conference related solely to Stout's meeting with the petitioner at Joliet, Illinois on August 29. (R. 55, 72, 76). According to the government's response to the motion for bill of particulars, Martin Shay made the alleged payment of $2650.00 at Kansas City, Missouri, which is within the Western District of Missouri. (R. 15)

The Court of Appeals has sustained the proof of venue on two grounds: (1) That the offense began in Pontiac, Illinois in the spring of 1952 but completed elsewhere, and therefore, falls within the purview of the first para-

graph of 18 U.S.C.A. 3237; (2) Since the alleged offense affected commerce within the Southern District of Illinois, it comes within the terms of the second paragraph of 18 U.S.C.A. 3237.

1. The error of that court's ruling that the crime began at Pontiac, Illinois arises from the fact that it relied upon an inaccurate, incomplete and misleading restatement of 18 U.S.C.A. 1951, commonly known as the Hobbs Act, and hereinafter referred to as the Act, and from the fact that it failed to note that the interstate commerce, namely the stringing contract, which allegedly was delayed and obstructed by the petitioner, was not only not awarded to the Cox partnership in the spring of 1952 but was not even in existence. At page 7 of its opinion that Court stated:

> "The statute involved refers to threats 'in furtherance of a plan or purpose.'" (App. p. 7a)

This restatement, as it is applied to the evidence in this case, adds an entirely new sense to the Act. The Act proscribed four unlawful actions, namely, the obstruction, delay, and affecting of commerce by robbery and extortion, the attempt so to do, the conspiracy so to do, and the commission and threatening of physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this Act. 18 U.S.C.A. 1951 a; 62 Stat. 793. That the aforementioned are four separate unlawful actions under the Act, is clearly evident from the Hobbs Act of July 3, 1946. 60 Stat. 420. The current Act of June 25, 1948 made no substantial changes in its predecessor; it merely avoided repetition of language. The 1946 Act has each of the four proscribed unlawful actions numbered separately.

When the Court of Appeals speaks of threats in furtherance of a plan or purpose, it is referring to a section 5 violation of the 1946 Act. This violation, however, is not present in the case before the bar. The petitioner was indicted for the obstruction, delay and affecting of commerce by extortion and for an attempt to do so. (R. 6) Under the 1946 Act, these are section 2 and section 4 violations. Furthermore, the evidence in this case, taken in a light most favorable to the government, discloses absolutely no proof of any plan on the part of the defendant to violate the Act in the spring of 1952 at Pontiac, Illinois. There is no evidence that the petitioner either committed or threatened physical violence to any of the partners or to their property. On the contrary, Morris Stout, himself, admitted on cross examination that the petitioner never caused or threatened any harm to Stout's person or to the firm's equipment. More than that, he boasted that he has never seen a man of whom he is physically afraid. (R. 59-60) The Court of Appeals, in characterizing the Pontiac conversation as a threat in furtherance of a plan, injects a theory of prosecution which was never adopted by the government either in its indictment, in the trial of the proceedings or during the course of the appeal.

The Pontiac conversation did not constitute a threat. Morris Stout had never met the petitioner prior to this meeting in the spring of 1952; he had never had any dealings with him, business or social. At this time, the Cox partnership was discharging a contract with the Sinclair Refining Company to unload pipe at certain rail heads; this contract has no significant bearing in these proceedings. Stout sought out the petitioner at Pontiac, Illinois to seek permission to use his own drivers on the unloading contract. The petitioner granted this con-

cession but limited it to this single unloading contract with persons who were not members of the local union. As a business agent of the union the petitioner could not afford to leave Stout with the impression that this was an indefinite concession, particularly since the stringing contract, if awarded, would require more manpower. The petitioner made this point with a choice of words, which have become a colloquialism in normal business relationships, and which are used daily, and related the deviation from the local union rule to this single event, inasmuch as the drivers were already in the area with their equipment and the job was of a minor nature before completion.

The effect of this conversation at Pontiac, Illinois, upon either Stout or his partners, is of vital importance in this case. The total absence of any effect is most significant. There is no crime under the Hobbs Act until the victim has been put in fear. "The gist of the unlawful Act is extortion. Extortion involves a state of mind as an element of an offense under the Act. Unless there is some form of compulsion (either physical or fear) there is no crime under this Act." *Nick* v. *United States,* 122 F. 2d 660, 671. In the case of *Callanan* v. *U. S.* 223 F. 2d 171, the Court of Appeals for the Eighth Circuit said at page 175:

> "It appears to us that the offense of extortion under the Hobbs Act has been committed if the defendants have illegally created fear in their victim, which fear has induced the victim to part with his money or property. If the fear is created in the victim for the purpose of extorting money or property, the offense is present, etc."

It is clear from the testimony of the government's own witnesses that neither Stout nor any of his partners was

"put in fear" as a result of Stout's conversation with the petitioner at Pontiac, Illinois in the spring of 1952. Therefore, under the law, no crime under the Hobbs Act was either committed or even begun at Pontiac, Illinois. If, as the Court of Appeals holds, this conversation was the beginning of the threat which eventually blossomed into an alleged extortion, committed in another judicial district, it certainly is reasonable to expect or assume that it would have caused some concern to the partners. This is particularly true in view of the fact that they were in the process of seeking the stringing contract. The record discloses the contrary. Stout's conversation with petitioner at Pontiac was never relayed to his partners at Raytown, Missouri. After his meeting with the petitioner on August 29, at Joliet, Illinois, however, he immediately set out to discuss the matter with his partners. (R. 49) The record is clear that the partnership conference at Raytown, Missouri on September 1, 1952 revolves solely about Stout's conversation with the petitioner at Joliet, Illinois. (R. 55, 72, 76) No mention was ever made of the Pontiac conversation; the record is further clear that the alleged payment of $2650.00 to the petitioner was made on November 25, 1952; this was five or six weeks before the stringing contract was completed. (R. 49)

The government and the Court of Appeals cling to an equivocal conversation in order to support the proof of venue. Five months after the date of the conversation, the partners confer and no reference is made to it. Eight months after the date of the conversation, the alleged payment of money is made by one of the partners. These are not the reactions or responses of a person who has been "put in fear". The evidence clearly shows that the meeting between Stout and the petitioner at Pontiac, Illinois was an innocent business meeting wherein labor matters

were discussed. It concerned itself to legitimate union employer collective bargaining arrangements. It is clear that no crime under the Hobbs Act was committed at Pontiac, Illinois.

If one should assume, *arguendo* that the Pontiac conversation constituted a threat within the Act, even then there could be no federal crime because the Cox partnership had not entered the commerce alleged to have been affected and more basically that commerce had not commenced. It cannot be disputed on this record that the commerce allegedly affected related to the stringing contract alone. The indictment so charged. The government, during the trial, argued the case on this theory. (R. 19, 129-130, 138-139) The partners' fears consisted of the fear of economic loss in the performance of the stringing contract. (R. 55)

It will be recalled that the Pontiac conversation occurred in the spring of 1952. It is clearly evident from Stout's own testimony that they had not yet been awarded the stringing contract and they had no assurance that they would receive the award. (R. 45) As a matter of fact, the O. R. Burden Construction Corporation, who subcontracted to the Cox partnership, did not receive its subcontract from the Briton Company until May 12, 1952. (R. 28). The Cox partnership was awarded the stringing contract during the latter part of the summer or early fall of 1952, (R. 79) and the partnership did not move men or equipment until this subcontract was procured. (R. 30)

It is clear that the stringing contract nor any of its incidents was not even in existence, much less awarded to the Cox partnership at the time of the Pontiac conversation. Yet, it is this commerce which the government contends was affected by the defendant's allegedly un-

lawful behavior. Since this commerce was not in existence in the spring of 1952, the Pontiac conversation can give no support to the proof of venue.

Finally, if the statement of the Court of Appeals that the purpose of the Pontiac conversation was characterized by the alleged threats subsequently made at Joliet, Illinois is to be accepted, that would still be insufficient to support the proof of venue. At best, such assumption would only show that the petitioner was preparing to commit the alleged offense when he met Stout at Pontiac. Under this assumption this is all the petitioner could have done at Pontiac since the stringing contract which, under the indictment and the government's theory of the case was obstructed and delayed by the petitioner's alleged unlawful conduct, was not even in existence. It is clearly held that the proof of the place of a preparation for a crime will not support venue. *Reass* v. *United States*, 99 F. 2d 752.

2. The petitioner respectfully submits that the ruling of the Court of Appeals that this offense falls within the provisions of the second paragraph of 18 U.S.C.A. 3237 because if affected commerce within the Southern District of Illinois is clearly erroneous. At page 7 of its opinion that Court said:

> "Moreover, we agree with the theory of the trial court that venue under the statute involved may be laid in any jurisdiction where commerce is affected. We have already sustained the government's contention that commerce was obstructed, interfered with and affected within the Southern District of Illinois. While no case is called to our attention and we find none on the point, we think it plain that it was the intention and purpose of Congress to authorize the laying of venue in any District wherein commerce is affected, and this irrespective both of defendant's

residence and the place where the coercive threats are made. The second paragraph of Title 18 U.S.C.A. Sec. 3237 provides in part:

> 'Any offense involving • • • transportation in interstate or foreign commerce is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce • • • moves.'" (App. p. 8a)

It should be noted that once again the Court of Appeals has fallen into serious error because of an inaccurate and incomplete reading of the second paragraph of 18 U.S.C.A. 3237. The statute reads: "Any offense involving *the use of the mails,* or transportation in interstate or foreign commerce, etc." (Emphasis added) The omission of the emphasized phrase changes the entire meaning and abuses the congressional intent as it is expressed in the simple language of the statute. The revisor's note reflect, and the Court of Appeals indicates, that this second paragraph was enacted in 1948 to remedy the ruling of this Honorable Court in the case of *United States* v. *Johnson,* 323 U.S. 273. In that case the defendant had been indicted for violation of the Federal Denture Act. The defendant was being prosecuted in the District of Delaware although he had placed the dentures into the mails in the Northern District of Illinois. This Court overruled the contention of the government that the defendant could be prosecuted in any District of any State through which the dentures were carried including Delaware, the place of delivery. It noted that the Dentures Act struck at two types of violators—the sender and the unlicensed dentist who brought the dentures into the state. This Court discussed the Elkins Act which includes a special venue provision

which provided for prosecution in any district through which transportation may have been conducted. This Honorable Court further stated, as the Court of Appeals observes on Page 8 of its opinion (App. p. 9a), that Congress may by use of the doctrine of continuing offense provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. The Court of Appeals, however, failed to note the following language immediately thereafter:

> "Thus, *an illegal use of the mails or of other instruments of commerce may subject the user to prosecution* in the district, where he sent the goods, or in the district of their arrival, or in any intervening district. Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." (Emphasis added) *United States* v. *Johnson*, 323 U.S. 273, 275.

This language represents the heart of the decision. According to this decision, Congress has the power to provide that an illegal *user* of the mails or of other instruments of commerce can be prosecuted in any district through which such mail or instrument of commerce travels. The decision of this Honorable Court did not say that Congress had the power to provide that an offender against interstate commerce could be prosecuted in any district where such commerce is affected even though the unlawful acts are committed in other districts. It is this language which congress answered when it enacted the second paragraph of 18 U.S.C.A. 3237. The language of that section clearly shows that congress intended only one thing, namely, that anyone who uses the mails or who

uses Interstate or foreign commerce to commit an offense can be prosecuted in any district through which such mail or commerce moves. Congress intended to reach the *user* of these facilities and not the one who affects them. As was stated by the Court of Appeals for the tenth circuit in the case of *United States* v. *Ross,* 205 Fed. 2d 619, 621:

> "The second paragraph of 3237 must be read in the light of the Sixth Amendment to the United States Constitution, which provides that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed. We think there is a clear distinction between a deposit for mailing or delivery and the use of the mails. The *use* of the mails continues from the point of deposit to the point of delivery. Crimes involving the *use* of the mails are therefore continuing crimes, but the unlawful act defined in sec. 1461 is the deposit for mailing and not a *use* of the mails which may follow such deposit. That act is complete when the deposit is made and is not a continuing act. It does not involve a *use* of the mails." (Emphasis added)

In the case before the bar there is no evidence whatsoever that the petitioner ever *used* any instrument of commerce to perpetrate the alleged unlawful act. The Court of Appeals erroneously applied the second paragraph of section 3237 solely because the petitioner's alleged unlawful conduct affected commerce within the Southern District of Illinois.

Nor is an offense under the Hobbs Act a continuing offense. The offense is complete when the victim is put in fear. This is clearly the holding of *Nick* v. *United States, supra,* and *Callanan* v. *U. S., supra.* The government itself adopted the same position in the recent case of *U. S.* v. *Green* (USSC, Oct. term 1955, #54). During the course of its discussion of the case of *U. S.* v. *Local*

807, a conspiracy case, it said at pp. 16-17 of its brief: "If threats and violence are used in connection with a plan or purpose to extort affecting interstate commerce, the crime is completed." In the recent case of *State* v. *Welech,* 1952, 10 N.J. 355, 91 A. 2d 751, 760, Mr. Chief Justice Vanderbilt clearly stated that extortion is not a continuing offense.

The effort of the Court of Appeals for the Seventh Circuit to determine venue according to the place of the affect upon commerce introduces a novel concept into the field of criminal law and radical departure from the law as it has been announced to this point. Article III, Section 2 and the Sixth Amendment of the United States Constitution guarantee every defendant the right to a speedy and public trial "by an impartial jury of the State and District wherein the crime shall have been *committed."* It is still the law that the venue of a crime may be fixed at a place, not where the act has its affect, but where the act denounced as a crime occurs. *In re Palliser,* 136 U.S. 257, 265; *Horner* v. *U. S.,* 143 U.S. 207, 213. *Armour Packing Co.* v. *U. S.,* 209 U.S. 56, 73-77; *Haas* v. *Henkel,* 216 U.S. 462, 473; *Salinger* v. *Loisel,* 265 U.S. 224, 232-235.

The petitioner respectfully insists that the alleged offense began with the alleged threat at Joliet, Illinois. It was there that the crime, if any, was committed.

Only one logical conclusion can be drawn from the opinion of the Court of Appeals: venue could have been laid in any of the proper districts which are found within the States of Oklahoma, Kansas, Missouri, Illinois, and Indiana. The pipe line was being constructed through all these states. The petitioner respectfully submits that the Court of Appeals is without power to promulgate so radical a departure from the Sixth Amendment. If this be the

case, then this decision has reduced the venue guarantee of the Federal Constitution to a mere nullity in all prosecutions of crimes affecting commerce.

The petitioner does not indulge in a mere technicality but is asserting a basic constitutional guarantee. That the right of every defendant to a speedy and public trial "By an impartial jury of the State and District wherein the crime shall have been committed" was of paramount concern to the framers of the Constitution, is evidenced by the fact that it was embodied in Article III, Section 2 and then repeated in the Sixth Amendment. Such emphasis demands that the Courts examine questions of venue with care and caution and that doubts be resolved in favor of the defendant. We are dealing with a clear cut constitutional right which should not be subject to any abridgment. In this regard it is well to remember the admonition of this Honorable Court in the case of *U. S.* v. *Johnson*, 323 U.S. 273, 276:

> "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

II.

The Court of Appeals committed error in sustaining the sufficiency of the indictment in spite of the fact that it failed to specify which of the three partners was actually threatened by the petitioner.

The requirements of an indictment are "to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." *U. S.* v. *Hess,* 124 U.S. 483.

In the case before the bar the indictment merely enumerated the members of the partnership; it did not specify to which partner the alleged threats were communicated. This has been left to the guesswork of the petitioner during the course of the preparation of his defense. Such pleading is not consistent with basic principles of justice and with the law as announced in the *Hess* case.

Two cases within the Seventh Circuit support the petitioner's theory. In the case of *Larkin* v. *United States,* 107 F. 697, 701 it was held that in describing and defining the offense the names of those injured, if known, must be stated; if the names are unknown to the grand jurors, it must be so stated. In the case of *U. S.* v. *Weber,* 71 F. Supp. 88 it was expressly held that the indictment should identify the persons composing a company and should also give the names of the officers to whom a misrepresentation complained of was made.

III.

The Court of Appeals committed error when it held that the government had proven the delivery of $2650.00 by Martin Shay to the petitioner beyond a reasonable doubt.

The pertinent portion of the evidence on this essential element of the crime is found in the testimony of Shay (R. 68-72). The evidence, taken in a light most favorable

to the government, shows only that Shay handed the petitioner an envelope in the Union Station, Kansas City, Missouri, after he, namely Shay, had travelled 23 miles from his office at Raytown, Missouri. Although there is evidence that the partnership bookkeeper obtained $2650.00 from the bank and brought it to the partnership office, there is no evidence that he gave it to Shay. There is no evidence that this money was placed in the envelope which was later allegedly handed to the petitioner. There is no evidence that the envelope seen in Shay's hand at the partnership office was the same envelope which Shay claimed he gave to the petitioner.

In order to sustain its findings the jury would be forced to infer or suppose that the sum of $2650.00 was placed in an envelope, and thereupon the jury would have to infer or suppose that it was this envelope and none other which Shay transported to Kansas City, Missouri, and handed to the petitioner.

The petitioner submits that this proof clearly represents a case of inference upon an inference, and not evidence which can support a conviction. This is a verdict of a jury founded, not upon evidence, but upon conjecture, surmise and speculation. Such verdicts have been previously condemned and overturned by Court of Appeals for the Seventh Circuit in *Caringella* v. *United States*, 78 F. 2d 563; *United States* v. *Wainer*, 170 F. 2d 603, 606.

IV.

If an offense was committed, the petitioner should be prosecuted under Section 302 of the Labor Management Relations Act rather than under the Hobbs Act.

Section 302 of the Labor Management Relations Act (29 U.S.C.A. 186) was enacted in 1947 as a part of the

comprehensive national labor code, commonly called the Taft-Hartley Act. Its passage followed by a full year the adoption of the Hobbs Act.

Section 302 is a criminal statute which provides:

> "(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in any industry affecting commerce.
>
> "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept or agree to receive or accept, from the employer of such employees any money or other thing of value."

Section 302 is an integral part of a detailed code, the Taft-Hartley Act, governing labor relations, collective bargaining and strikes, the precise subject matter to which the indictment is directed.

The announced legislative purposes of the Taft-Hartley Act make clear the Congressional intent to control the subject matter of the case at bar:

> "• • • It is the purpose and policy of this chapter • • •to define and proscribe practices on the part of labor • • • which • • • are inimical to the general welfare." 29 U.S.C.A. 141.
>
> " • • Experience has • • • demonstrated that certain practices by some labor organizations (and) their officers • • • have the intent or • • • effect of burdening or obstructing commerce through strikes and other forms of industrial unrest. • • •" 29 U.S.C.A. 1951.

Both the Senate Committee Report and Senator Taft described the amendment which is now Section 302 as designed to make extortion by union representatives a crime.

Thus in Senate Report No. 105 on S. 1126, 80th Congress, 1st Sess., Supplemental Views, p. 52 (*1 Leg. His. L.M.R.A. 1947*, 458) the following statement appears:

> "The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, in consideration of the services of employees, to the union treasury or the union officers, except under the process of strict accountability. Thus the amendment makes *extortion* illegal." (Emphasis supplied)

And Senator Taft stated on the floor of the Senate preceding the adoption of the amendment *(Leg. His. L.M.R.A. 1947*, p. 1311):

> "Obviously the man who is bargaining should have no right to obtain any personal advantage. "The amendment provides first that——'It shall be unlawful for any employer to pay or deliver, or agree to pay or deliver any money or other thing of value to any representative of any of his employees.'
>
> "That is it may be said, in a case of *extortion* or a case where the union representative is *shaking down the employer.*" (Emphasis supplied)

It is irrefutable both from the express language of Section 302 of the Labor Management Relations Act and from its legislative history that the section punishes all forms of securing money from employers by representatives of labor unions representing their employees whether as extortions or bribes.

While Section 302 is a specific statute directly applicable to the giving of money by a representative of management to a representative of labor in an industry affecting commerce, the Hobbs Act is couched in terms of broad and general application.

If, by any construction, the Hobbs Act on its face should be deemed to apply to the facts of the indictment, that statute must be harmonized with Section 302.

In order to harmonize the Hobbs Act, thus construed, and Section 302, a well accepted rule of statutory construction must be invoked. "It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to or qualification of, the general statute, whether it was passed before or after such enactment. *82 C.J.S. Statutes Para.* 369 (pp. 843-844).

This principle was invoked by the Court of Appeals for the Seventh Circuit in *Snitkin* v. *United States*, 265 F. 489 (1920).

An excellent summary of the *Snitkin* case appears in *Commonwealth* v. *Brown*, 346 Pa. 192, 29 Atl. 2d 793 (1943) wherein it is stated (29 Atl. 2d at 796-797):

> "It is the policy of the law not to permit prosecutions under the general provisions of a penal code when applicable special penal provisions are available. • • • In *Snitkin* v. *United States*, 7 Cir., 265 F. 489, 496, a defendant charged with obstructing the draft was indicted under the Selective Draft Act • • • and also under the Espionage Act • • •. The Circuit Court of Appeals of the Seventh Circuit held • • • that the same facts which would constitute an offense under one act also constituted an offense under the second act and that the first act being specific and the second act general, the first governs where the facts bring the offense within it. The Court said 'If the government were conceded the right to elect under which statute it would prosecute, it would probably choose the Espionage Act as authorizing

> the heavier penalty, but in our judgment the district attorney cannot be permitted to make such an election * * * the question is a judicial one'."

It follows that since prosecution under Sec. 302 would lie under the facts alleged in the indictment, prosecution under the Hobbs Act will not lie.

One more rule of statutory construction militates against the application of the Hobbs Act of 1946 to conduct, indisputably cognizable under Section 302 of the Labor Managment Regulations Act, 1947. If it ever could have been argued that the conduct described in the indictment came within Hobbs, Section 302 resolved that doubt by including such conduct within its proscription and, to that extent at least, by implication repealed Hobbs (*U.S.* v. *Tynen*, 11 Wall. 88, 20 L. Ed. 153, 155) "pro tanto to the extent of the repugnance) (*U. S.* v. *Borden Co.*, 308 U.S. 188, 199). While repeals by implication are not favored, "in construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty" (*U.S.* v. *Yuginovich*, 256 U.S. 450, 463).

CONCLUSION.

Wherefore, the petitioner prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit and that, upon such review, the judgment of the Court of Appeals be reversed and the cause be remanded with instructions to discharge the petitioner.

Respectfully submitted,

I. Harvey Levinson,

Frank J. McAdams, Jr.,
Attorneys for Petitioner.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11386. OCTOBER TERM, 1955, JANUARY SESSION, 1956.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
VIRGIL FLOYD,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.

January 13, 1956.

Before DUFFY, *Chief Judge*, MAJOR and LINDLEY, *Circuit Judges.*

MAJOR, *Circuit Judge.* Defendant, Virgil Floyd, business agent of Local 179 of the Teamsters' Union, with an office in Joliet, Illinois, was charged in a two-count indictment with a violation of Title 18 U.S.C.A. Sec. 1951 (a), known as the Hobbs Act or the Anti-Racketeering Act. Prior to trial, defendant by an appropriate motion challenged the sufficiency of the indictment and failure to allege venue in the second count. On the government's motion the second count was dismissed; otherwise, defendant's motion was overruled. A trial was had by jury, which found the defendant guilty. Judgment was entered accordingly, from which defendant appeals.

We think there is no occasion to set forth the Act upon which the indictment is predicated as that has frequently been done by other courts. See particularly *Bianchi* v. *United States*, 219 F. 2d 182, 186, and *United States* v. *Varlack*, 225 F. 2d 665, 672.

The reasons urged for a reversal are: (1) that the indictment was fatally defective because of a failure to designate the particular individual or individuals upon whom the alleged extortion was practiced; (2) that the proof failed to show beyond a reasonable doubt (a) the existence of interstate commerce within the Southern District of Illinois, which was affected or obstructed by defendant's alleged extortion, (b) the receipt of money by defendant as alleged, and (c) venue, that is, the commission of an offense against the United States within said District.

The indictment, insofar as material to its asserted deficiency, alleged that defendant "did knowingly, wilfully, unlawfully and feloniously obstruct, delay and affect 'commerce' between the several states of the United States, and the movement of the aforesaid articles, commodities, materials, supplies, pipe, machinery, and men in such 'commerce,' and did attempt so to do, by extortion, to wit: by obtaining property of the value of $2,650.00 in the form of money, from 'the contractors,' with their consent, induced by the wrongful use of actual and threatened force, violence, and fear, that is to say * * *." (There follows a detailed description of the threats which the defendant directed at "the contractors" as a means of obtaining the payment alleged to have been made.)

The indictment previously alleged in count 1:

> "That hereinafter in this Indictment the term—* * *
>
> "(e) 'the contractors' shall refer to a co-partnership composed of one J. Leroy Cox, one Martin Shay, and one Morris Stout, doing business under the style and name of J. L. Cox & Sons Pipe Stringing Corporation. * * *"

Defendant argues that the allegation that defendant threatened "the contractors" and that he extorted or attempted to extort money from "the contractors" is insufficient to inform him as to the person or persons to whom alleged threats were made and from whom money was sought to be extorted. Defendant cites on this point *United States* v. *Weber*, 71 F. Sup. 88; *United States* v. *Callanan, et al.*, 113 F. Sup. 766, and *Larkin* v. *United States*, 107 Fed. 697, 701. Without analyzing these cases, we think it may be conceded that they furnish support for the contention that the indictment would be insufficient if it alleged nothing more than that threats were made to "the contractors" and that "the contractors" were the victims thereof.

However, the indictment also defined "the contractors" as a co-partnership composed of three individuals, Cox, Shay and Stout, with the firm name under which they were doing business. This allegation must be taken into consideration and when that is done we think any merit which might otherwise reside in defendant's contention disintegrates. An allegation that the defendant threatened and extorted or sought to extort money from Cox, Shay and Stout, doing business under a designated partnership name, would have been no more specific or informative to the defendant. He was charged in effect, if not specifically, with committing the alleged offense against these three named individuals, and that, in our judgment, was sufficient.

On the commerce issue the attack is directed at the insufficiency of the proof, not the allegations of the indictment. We think defendant's contention on this point may be disposed of by a brief statement of the facts. Sinclair Pipe Line Company of Independence, Kansas (a subsidiary of Sinclair Oil Company), was in the year 1952 engaged in the construction of an interstate pipeline extending from the state of Oklahoma, across the state of Missouri and entering the state of Illinois at a point near Quincy, Adams County, and thence easterly across said state, with its terminus at East Chicago, Indiana. Adams